In the Supreme Court of the United States

Office - Supreme Court, U.S.
FILED
DEC 7 1940
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1940

No. 483

STATE OF WASHINGTON,
Petitioner (Appellant below),

vs.

INLAND EMPIRE REFINERIES, INC, a corporation,
Respondent (Respondent below).

MONTANA HEADLIGHT OIL COMPANY, a corporation, and GREAT NORTHERN RAILWAY COMPANY, a corporation,
Respondents
(Intervenors and Respondents below).

BRIEF OF RESPONDENTS INLAND EMPIRE REFINERIES, INC., AND GREAT NORTHERN RAILWAY COMPANY

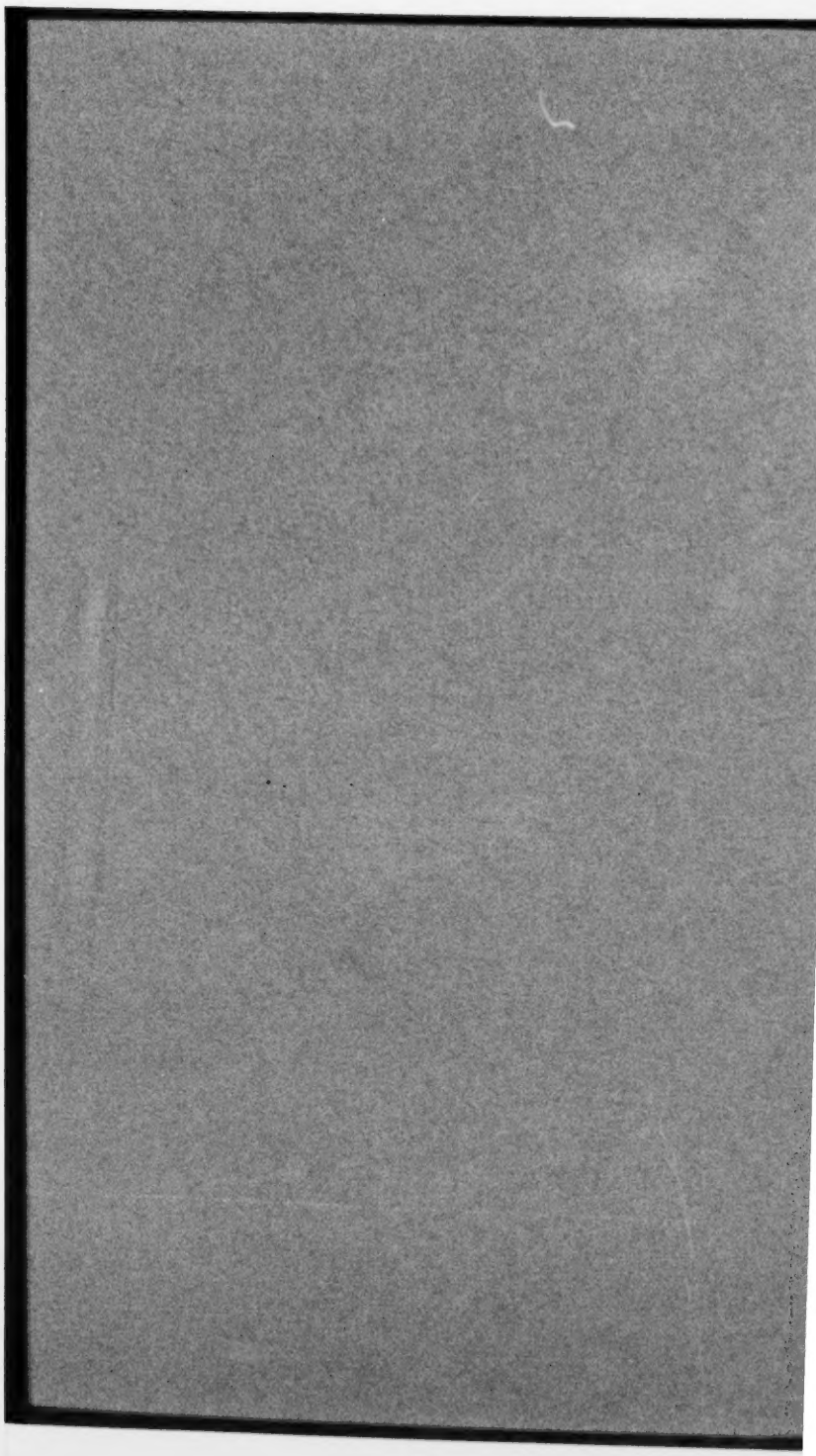
R. E. LOWE,
Spokane, Washington.
Attorney for Respondent Inland Empire Refineries, Inc.

F. G. DORETY,
St. Paul, Minnesota.

THOMAS BALMER,
EDWIN C. MATTHIAS,
ANTHONY KANE,
Attorneys for Respondent Great Northern Railway Company.

805 Great Northern Railway Building,
404 Union Street,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE



In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 483

STATE OF WASHINGTON,
Petitioner (Appellant below),

vs.

INLAND EMPIRE REFINERIES, INC, a corporation,
Respondent (Respondent below).

MONTANA HEADLIGHT OIL COMPANY, a corporation, and GREAT NORTHERN RAILWAY COMPANY, a corporation,
Respondents
(Intervenors and Respondents below).

BRIEF OF RESPONDENTS INLAND EMPIRE REFINERIES, INC., AND GREAT NORTHERN RAILWAY COMPANY

R. E. LOWE,
Spokane, Washington.
Attorney for Respondent Inland Empire Refineries, Inc.

F. G. DORETY,
St. Paul, Minnesota.

THOMAS BALMER,
EDWIN C. MATTHIAS,
ANTHONY KANE,
Attorneys for Respondent Great Northern Railway Company.

305 Great Northern Railway Building,
404 Union Street,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Statement	1
Summary of Argument	9
Argument	9
Conclusion	19

TABLE OF CASES

American Railway Express Co. v. Royster Guano Co., 273 U. S. 274, 71 L. ed. 642	20
Atchison, Topeka & Santa Fe Ry. v. Railroad Commission, 283 U. S. 380, 75 L. ed. 1128	14
J. Bacon & Sons v. Martin, 305 U. S. 380, 83 L. ed. 233	20
Bilby v. Stewart, 246 U. S. 255, 62 L. ed. 701	18
Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U. S. 537, 74 L. ed. 1023	10, 11
Carstairs v. Cochran, 193 U. S. 10, 48 L. ed. 596	14
Dorchy v. Kansas, 264 U. S. 286, 68 L. ed. 686	16
Dorchy v. Kansas, 272 U. S. 306, 71 L. ed. 248	20
Elkins v. Land Title Bank & Trust Co., 302 U. S. 638, 83 L. ed. 496	10
Enterprise Irrigation Co. v. Farmers Mutual Canal Co., 243 U. S. 157, 61 L. ed. 644	10, 11
Fort Smith Lbr. Co. v. Arkansas ex rel. Arbuckle, 251 U. S. 532, 64 L. ed. 396	14
Fox Film Corporation v. Muller, 296 U. S. 207, 80 L. ed. 158	10, 12, 16
Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305	16
Great Northern Ry Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 77 L. ed. 360	20
Guaranty Trust Co. v. Blodgett, 287 U. S. 509, 77 L. ed. 463	20
Guinn v. United States, 238 U. S. 347, 59 L. ed. 1340	16
Hallanan v. Eureka Pipe Line Co., 261 U. S. 393, 67 L. ed. 715	16

Page

Henderson Bridge Co. v. City of Henderson, 141 U. S. 679, 35 L. ed. 900 10
Hill v. Wallace, 259 U. S. 44, 66 L. ed. 822 15
Jensen v. Henneford, 105 Wash. 209, 53 P. (2d) 607 15
Kalb v. Feuerstein, 84 L. ed. Advance Opinions p. 281 ..... 10, 12
Keith v. Johnson, 271 U. S. 1, 70 L. ed. 795 20
King v. West Virginia, 216 U. S. 92, 54 L. ed. 396 16
Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635 10
Knights of Pythias v. Meyer, 265 U. S. 30, 68 L. ed. 885 ..... 19, 20
McCoy v. Shaw, 277 U. S. 302, 72 L. ed. 891 ..... 10, 11
Merchants' & Manufacturers' National National Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236 14
Minnesota ex rel. Pearson v. Probate Court of Ramsey Co., 84 L. ed. Advance Opinions, p. 477 ..... 19, 20
Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 70 L. ed. 818 20
Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490 14
Neblett v. Carpenter, 305 U. S. 297, 83 L. ed. 182 14
Olson v. Smith, 195 U. S. 332, 49 L. ed. 224 16
Pacific Telephone & Telegraph Co. v. Henneford, 306 U. S. 637, 83 L. ed. 1038 ..... 10, 12
Petrie v. Nampa and Meridian Irrigation District, 248 U. S. 154, 63 L. ed. 178 10
Roe v. Kansas ex rel. Smith, 278 U. S. 191, 73 L. ed. 259 20
Salomon v. Graham, 15 Wall. 208, 21 L. ed. 37 14
Schneider Granite Co. v. Gast Realty & Inv. Co., 245 U. S. 288, 62 L. ed. 292 16
State ex rel. Hamilton v. Cohn, 1 Wn. (2d) 54, 95 P. (2d) 38 2
Sutter Butte Canal Co. v. Railroad Commission, 279 U. S. 125, 73 L. ed. 637 20

Page

Utley v. City of St. Petersburg, 292 U. S. 106, 78 L. ed. 1155 ..... 10, 14, 15

Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 69 L. ed. 785 16

CONSTITUTIONS

14th Amendment to Constitution of United States 1, 3, 4, 5, 6, 8, 18

Article I Section 12 of Constitution of State of Washington 1, 3, 4, 5, 6, 8, 9, 17

STATUTES

Chapter 186 Laws of Washington 1939 ..... 1,4, 5, 6, 8, 17, 18, 19, 21

Sec. 15(e) 2, 3, 4, 5, 9, 13, 15, 18, 19

Sec. 15(d) 8, 9, 13, 15

Sec. 15(f) 8, 9, 13, 15

Sec. 21 5

OPINION OF COURT BELOW

State of Washington v. Inland Empire Refineries, Inc., et al., 3 Wn. (2d) 651, 101 P. (2d) 975 2

In the Supreme Court of the United States

OCTOBER TERM, 1940

STATE OF WASHINGTON, *Petitioner* (Appellant below), vs. INLAND EMPIRE REFINERIES, INC, a corporation, *Respondent* (Respondent below). MONTANA HEADLIGHT OIL COMPANY, a corporation, and GREAT NORTHERN RAILWAY COMPANY, a corporation, *Respondents* (Intervenors and Respondents below).	No. 483

BRIEF OF RESPONDENTS INLAND EMPIRE REFINERIES, INC., AND GREAT NORTHERN RAILWAY COMPANY

STATEMENT

This proceeding is unique in that petitioner, who seeks to have this court take jurisdiction upon the ground that Chapter 186 Laws of Washington 1939 was held by the court below to be in violation of the Federal constitution, was the first one to attack the constitutionality of that statute on the ground it violates not only the fourteenth amendment to the constution of the United States but also Article I Section 12 of the constitution of the State of Washington. Not only did petitioner attack the statute on both of these state and federal constitutional grounds in the complaint filed in this case shortly after the statute became effective (see opinion of lower court (R. 63)

reported in 3 Wn. (2d) 651, 101 P. (2d) 975), but on March 22, 1939, several weeks prior to the time the statute became effective, petitioner filed mandamus proceedings to try out this question. These proceedings were held to be premature. *State ex rel. Hamilton v. Cohn*, 1 Wn. (2d) 54, 95 P. (2d) 38.

In both proceedings—the case at bar and the mandamus action found to be premature—petitioner sought to have the state court strike Section 15(e) and enforce all of Chapter 186 Laws of Washington 1939, except said section upon the ground that Chapter 186 with Section 15(e) as a part thereof was in violation of both the state and federal constitutions.

The court below refused to strike said section, holding that the state constitution did not give it that authority, and then held Chapter 186 with Section 15(e) as a part thereof is in violation of both the state and federal constitutions as contended by petitioner (R. 63). This case is unique because it seems to be the first time that a petitioner has had the temerity to ask this court to review a case decided in the court below on state constitutional grounds that were raised by the petitioner.

The position taken by petitioner throughout this litigation is shown in the following quotation from the opinion of the Supreme Court of the State of Washington in this case. In the second paragraph of the opinion the court said:

> "The purpose of the action is to test the validity of the exemption embodied in subdivision (e) Section 15, Chapter 186, Laws 1939. * * * It is the State's position that that subdivision is in-

valid and must be discarded, with the result that distributors of locally refined fuel oil would become subject to the tax." (R. 63)

Further in the opinion the court said:

"The attorney general concurs in the view that subsection (e), *supra*, is unconstitutional, as disclosed by the following on page nineteen of appellant's brief:

" 'So far as this case is concerned, sub-section (e) of section 15 of the act, undertaking to exempt from the excise tax "distributors" of products derived from refining within the state of crude petroleum or crude oil, in our opinion, discriminates in favor of Washington refineries and against distributors dealing in petroleum products refined in other states, imported into this state and here sold and such discrimination is violative of the equal protection clause of the 14th amendment to the constitution of the United States *and section 12 of Article I of the constitution of the state of Washington.*' " (Italics ours) (R. 69)

Petitioner's attempt to persuade this court to take jurisdiction makes it essential to notice at the outset that throughout this litigation petitioner has both conceded and contended that Section 15(e) of Chapter 186 Laws of Washington 1939 is invalid under Article I Section 12 of the constitution of the State of Washington, as well as under the 14th amendment to the federal constitution. Respondent Railway Company has at all times agreed with petitioner that Section 15(e) is invalid under both the state and the federal constitutions. It has contended, however, that the invalidity of that section renders all of Chapter 186

Laws 1939 unconstitutional and void and that the admitted invalid exemption can not be stricken and the remainder of the act enforced. The Railway Company was by order of the court permitted to file a complaint in intervention (R. 9) and thereafter an amended complaint in intervention (R. 187). The Railway Company's intervention was ordered because of a certain contract it has with the respondent Inland Empire Refineries, Inc., under which the Refinery supplies the Railway Company with a portion of its fuel oil. This contract by its terms requires the Railway Company to pay the Refinery, in addition to the stated price per barrel, any tax lawfully found due (R. 63, 75). In its amended complaint in intervention the Railway Company alleged that the clear and unquestioned invalidity of Section 15(e) under both the federal (14th Amendment) and the state (Section 12 Article I) constitutions rendered Chapter 186 void *in toto* (R. 200-201). In the same complaint the Railway Company alleged other and addditional grounds, based on both the state and the federal constitutions, for holding Chapter 186 Laws of Washington 1939 void in its entirety (R. 195-205).

The Superior Court of the State of Washington upheld all of the contentions of the Railway Company, and after making full and complete findings of fact (R. 21) and conclusions of law (R. 48) entered judgment holding Chapter 186 Laws of Washington 1939 unconstitutional and void (R. 55). The petitioner thereafter took an appeal to the Supreme Court of the State of Washington.

On April 26, 1940, that court, seven judges assent-

ing and two judges dissenting, affirmed the judgment entered by the trial court. The opinion of the court holding Chapter 186 Laws 1939 unconstitutional and void is primarily bottomed upon the state constitution (Article I section 12) and upon the rule than an invalid exemption provision contained in a state law cannot be stricken and the remainder enforced, when the effect is to broaden the scope of the act and thereby include as taxable persons the legislature has said were not to be taxed (R. 63).

As the petitioner at all times, both in the trial and appellate courts, alleged and argued that the exemption granted by Section 15(e) was unconstitutional and void under both the state and federal constitutions, it was obvious that the Supreme Court of the State of Washington would invalidate that section. It supported its holding on this point with a series of its own decisions construing Article I section 12 of the state constitution, with decisions of this court construing the 14th amendment to the federal constitution and with the Attorney General's own language, which has been quoted (R. 68-69). The fact should not be overlooked that the dissenting opinion of Blake, C. J. also recognized the obvious invalidity of Section 15(e) (R. 75).

The court then held that notwithstanding the presence in the act of a severability clause (section 21), section 15(e) could not be stricken and the remainder of the act enforced.

Adhering to its own prior decisions and also decisions of this court, it said:

"When Chapter 186, Laws 1939, was passed

> by the legislature and signed by the Governor, a tax was imposed by that statute upon every distributor of petroleum products, except those exempted by Section 15. It would be contrary to the expressed intent of the legislature for us to sustain the act, after striking down Section 15, subdivisions (d), (e) and (f), and impose upon the persons included within those exemption clauses the distributors who the legislature said were not to be taxed." (R. 71)

The opinion of the state court holding Chapter 186 unconstitutional and void was also based on the following state and federal grounds:

I. Chapter 186 Laws 1939 violates the requirement laid down by both the federal (14th amendment) and *the state* (*Article I Section 12*) *constitutions* that there must exist a reasonable ground for classifying those taxed and those left untaxed.

(a) Because it imposes a tax of 11% on distributors of fuel oil and leaves untaxed distributors of competing forms of fuel, such as coal, wood, sawdust and coke.

(b) Because users of all kinds of fuel must pay the 2% compensating tax, but only users of fuel oil pay in addition the 11% tax imposed by Chapter 186.

With respect to these questions, the Supreme Court of the State of Washington said:

> "True, the legislature has broad powers respecting the classification of property for excise tax purposes, yet the foregoing provisions of the federal (14th amendment) and *state constitutions* (*Article I Section 12*) *forbid an arbitrary* classification. The legislature may constitution-

ally classify persons with reference to their business, occupation or inheritance, with a view of exaction from them of excise or privilege taxes differing in amount, or differing in that one class shall be taxed and another class shall be exempted, so long as there may be some reasonable basis for such classification and so long as all in each class shall be taxed or exempted alike. * * *

"Chapter 186 Laws of 1939 violates the requirement that reasonable ground must exist for making a distinction between those who fall within the class and those who do not. No reasonable ground exists for making a distinction between those who fall within the classification of distributors of fuel oil subject to tax and distributors of fuel not subject to tax. That is, a distributor of fuel oil is required to pay a tax of approximately eleven per cent for the privilege of distributing fuel oil while there is no comparable tax upon distributors of coal, wood, sawdust, coke, gas and electricity. * * *

"To impose the compensating tax upon all persons in this state for the privilege of using tangible personal property in the state and then to single out a particular group (users of fuel oil) and impose an additional tax upon them for the same privilege is indefensible on constitutional grounds. It is violative of the rule that reasonable ground must exist for making a distinction between those who fall within, and those excluded from the classification for tax purposes. *It is, we repeat, in defiance of the purposes of the privileges and immunities clause of the state constitution* and contravenes the equal protection provision of the federal constitution." (Italics ours) (R. 65, 66, 67)

2. Chapter 186 Laws 1939 is unconstitutional because the exemption created by section 15(d) is invalid as discriminatory under both the federal (14th amendment) and the state (Article I Section 12) constitutions (R. 67). This exemption is also invalid as an attempt by the state to regulate interstate commerce (R. 68). Section 15(d) cannot be stricken from the act and the remainder enforced (R. 71-74).

3. Chapter 186 Laws 1939 is unconstitutional because of the exemption created by Section 15(f). "The classification is so obviously glaringly arbitrary, capricious and unreasonable that it seems hardly necessary to do more than invoke the equal protection clause of the federal constitution *and the privileges and immunities clause of our state constitution* to strike down this extension of special privilege to one public utility and denial to other public utilities of a like privilege of exemption" (R. 69) (Italics ours). Section 15(f) cannot be stricken from the act and the remainder enforced (R. 71-74).

4. Chapter 186 Laws 1939, by the conditions it imposes, constitutes an unlawful burden upon interstate commerce, and hence is unconstitutional under the federal constitution (R. 70-71).

Petitioner once in its petition (page 7) and once in its supporting brief (page 23) says that the Supreme Court of the State of Washington "inadvertently" referred to the tax imposed by Chapter 186 as a pass-on or consumer's tax. There was no inadvertence in the court's construction of Chapter 186 as a pass-on or consumer's tax. This construction was based on a finding by the trial court (R. 36, Finding of Fact

XXI), supported by substantial evidence (R. 300, 303-304, 305-306, 307).

This, then, is a case where the validity of a state statute was challenged by the Railway Company on both state and federal constitutional grounds. All constitutional rights claimed by the Railway Company were sustained. None were denied. The entire act was held void.

SUMMARY OF ARGUMENT

The Supreme Court of the State of Washington having held that Section 15(e), which petitioner has admitted is invalid under Article I, Section 12 of the state constitution, could not be separated from the remainder of the act, and having held that Sections 15(d) and 15(f) were also invalid under the same article and section of the state constitution, and that they likewise could not be separated from the remainder of the act, and also having held that the entire act was invalid under Article I Section 12 of the state constitution because it made an arbitrary, capricious and unreasonable classification between those taxed and those left untaxed, and such holdings being independent non-federal grounds of decision adequate to support the judgment, this court will not grant certiorari.

ARGUMENT

This court has held from earliest times that if a decision of the state court is based upon several grounds, one or more of which is an independent non-federal ground adequate to sustain its judgment, that

judgment cannot be reviewed by this court unless the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or as a mere device to prevent the review of the decision upon federal questions.

McCoy v. Shaw, 277 U. S. 302, 303; 72 L. ed. 891, 892;

Enterprise Irrigation Co. v. Farmers Mutual Canal Co., 243 U. S. 157, 164; 61 L. ed. 644, 648;

Fox Film Corporation v. Muller, 296 U. S. 207, 210; 80 L. ed. 158, 159;

Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U. S. 537, 540; 74 L. ed. 1023, 1030;

Petrie v. Nampa and Meridian Irrigation District, 248 U. S. 154, 157; 63 L. ed. 178, 179;

Kalb v. Feuerstein, 84 L. ed. (Adv. Opinion) p. 281 at 283;

Henderson Bridge Co. v. City of Henderson, 141 U. S. 679; 35 L. ed. 900, 904;

Elkins v. Land Title Bank & Trust Co., 302 U. S. 638; 82 L. ed. 496;

Klinger v. Missouri, 13 Wall. 257; 20 L. ed. 635, 637;

Utley v. City of St. Petersburg, 292 U. S. 106, 111; 78 L. ed. 1155, 1159;

Pacific Telephone & Telegraph Co. v. Henneford, 306 U. S. 637; 83 L. ed. 1038; 195 Wash. 553.

In *McCoy v. Shaw, supra,* 277 U. S. 302, 303; 72 L. ed. 891, 892, the court said:

> "It is settled law that a judgment of a state court which is put upon a non-federal ground, independent of the federal question involved and broad enough to sustain the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question."

Again, in *Enterprise Irrigation Co. v. Farmers Mutual Canal Co., supra,* 243 U. S. 157, 164; 61 L. ed. 644, 648, the court said:

> "Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it. * * * Where the non-federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions."

In the late case of *Broad River Power Co. v. South Carolina ex rel. Daniel, supra,* 281 U. S. 537, 540; 74 L. ed. 1023, 1030, the court stated the rule as follows:

> "but if there is no evasion of the constitutional issue * * * and the non-federal ground of decision has fair support * * * this court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own

view of what should be deemed the better rule for that of the state court."

In dismissing for want of jurisdiction the writ of certiorari filed in the case of *Fox Film Corporation v. Muller, supra,* 296 U. S. 207, 210; 80 L. ed. 158, 159, this court said:

> "The case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our decision fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed, at least as early as *Klinger v. Missouri,* 13 Wall. 257, 263; 20 L. ed. 635, 637, and has been reiterated in a long line of cases since that time."

Mr. Justice Black, in *Kalb v. Feuerstein, supra,* 84 L. ed. Adv. Opinion, p. 281, 283, stated the rule in the following way:

> "Appellees insist, however, that the Wisconsin court on rehearing rested its judgment on an adequate non-federal ground. If that were the fact, we would not under accepted practice, reach the state court's construction of the federal statute."

One of the most recent decisions on the question is *Pacific Telephone & Telegraph Co. v. Henneford, supra,* 306 U. S. 637; 83 L. ed. 1038; 195 Wash. 553, a case going up from the State of Washington. On February 6, 1939, this court denied, without opinion, a petition for writ of certiorari by the Tax Commission of the State of Washington to review a decision of the Supreme Court of the State of Washington holding a state statute imposing an excise tax desig-

nated as a "compensating tax" unconstitutional. In that case the state court, as it has in the case at bar, based its opinion holding that the Telephone Company was not subject to tax, upon both state and federal grounds: (1) that the statute was not intended to impose a tax upon merchandise purchased outside the state, which could not be purchased within the state, the purpose of the tax being to protect local merchants against out of state competition, and (2) the tax imposed by the statute amounted to an unlawful burden upon interstate commerce. This court's refusal to review the state court's decision was apparently based upon the existence of an adequate non-federal ground relied upon by the state court, even though it also rested its decision upon a federal ground.

The case at bar comes squarely within the rule of the foregoing cases. Each non-federal ground of the decision is adequate to support the judgment. The petitioner at all times contended in the state court that Section 15(e) was unconstitutional under both the state and federal constitutions (R. 2, 18, 19, 69). Petitioner does not in this court contend that Section 15(e) is valid. It admits the contrary (p. 29 Petitioner's Brief). The State Supreme Court held on undisputed authority that the exemption from tax extended to local refiners by Section 15(e) was invalid under the state constitution (R. 71-74).

The state court also held on the authority of its own prior decisions that the exemption from tax extended to foreign vessels by Section 15(d) and the exemption extended to gas companies by Section 15(f) were invalid under the state constitution (R. 67, 68, 69).

A decision by the Supreme Court of the state that the state statute is repugnant to the state constituion is conclusive upon this court and does not present any question for review.

This rule is supported by a long line of cases, a few of which are:

Neblett v. Carpenter, 305 U. S. 297, 302; 83 L. ed. 182, 187;

Utley v. St. Petersburg, 292 U. S. 106, 110; 78 L. ed. 1155, 1158;

Atchison, Topeka & Santa Fe Ry. v. Railroad Commission, 283 U. S. 380, 390; 75 L. ed. 1128, 1136;

Fort Smith Lbr. Co. v. Arkansas ex rel. Arbuckle, 251 U. S. 532, 534; 64 L. ed. 396, 399;

Montana ex rel. Haire v. Rice, 204 U. S. 291, 301; 51 L. ed. 490, 495;

Merchants' & Manufacturers' National Bank v. Pennsylvania, 167 U. S. 461, 462; 42 L. ed. 236, 237;

Salomon v. Graham, 15 Wall. 208, 210; 21 L. ed. 37, 39;

Carstairs v. Cochran, 193 U. S. 10; 48 L. ed. 596, 597.

In the case of *Atchison, Topeka & Santa Fe Ry. v. Railroad Commission, supra*, 283 U. S. 380, 390; 75 L. ed. 1128, 1136, the rule is stated thus:

> "The decision of the state court is conclusive so far as the constitution and laws of the state are concerned."

This exact question was before the court in *Montana ex rel. Haire v. Rice, supra*, 204 U. S. 291, 301;

51 L. ed. 490, 495, in which the state court had also held a state statute unconstitutional and the court refused to review that decision, saying:

> "It is further claimed by the plaintiff in error that the Supreme Court of the state erred in holding that the law under which the bonds were issued and the proceeds of the public lands devoted to their payment was repugnant to the constitution of the state. Upon this question the decision of that court is conclusive, and plainly we have no power to review."

As said in *Utley v. St. Petersburg, supra*, 292 U. S. 106, 110; 78 L. ed. 1155, 1158:

> "We do not elaborate the argument, for the conflict, if there is any, between the statute regulating this improvement and the local constitution, must be judged, not by us, but by the courts of the locality."

A decision by the Supreme Court of the state that an invalid section is inseverable is conclusive upon this court.

"It would be contrary to the expressed intent of the legislature for us to sustain the act after striking down sections 15(d), (e) and (f) and impose upon the persons included within those exemption clauses the distributors whom the legislature said were not to be taxed" said the Supreme Court of the State of Washington, basing its decision upon its own prior controlling decision in *Jensen v. Henneford*, 105 Wash. 209; 53 P. (2d) 607, and upon the leading case of *Hill v. Wallace*, 259 U. S. 44; 66 L. ed. 822 (R. 71).

That such a decision is conclusive upon this court

is established by the case of *Dorchy v. Kansas*, 264 U. S. 286, 290; 68 L. ed. 686, 690, wherein it was said:

> "The task of determining the function of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this court."

To the same effect:

Fox Film Corporation v. Muller, 296 U. S. 207, 210; 80 L. ed. 158, 160;

Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 562; 69 L. ed. 785, 788;

Hallanan v. Eureka Pipe Line Co., 261 U. S. 393, 397; 67 L. ed. 715, 718;

Schneider Granite Co. v. Gast Realty & Inv. Co., 245 U. S. 288, 290; 62 L. ed. 292, 295;

Guinn v. United States, 238 U. S. 347, 366; 59 L. ed. 1340, 1348;

King v. West Virginia, 216 U. S. 92, 101; 54 L. ed. 396, 401;

Gatewood v. North Carolina, 203 U. S. 531, 541; 51 L. ed. 305, 309, 310;

Olsen v. Smith, 195 U. S. 332, 342; 49 L. ed. 224, 229.

The state court also based its decision on other non-federal grounds. The non-federal grounds being adequate to support the judgment of the state court, the existence of a federal question is not ground for granting a writ of review.

In addition to the foregoing independent non-federal grounds, any one of which is adequate to sustain the judgment of the state court, the Supreme Court of the State of Washington held Chapter 186 was void under the privileges and immunities clause of the state constitution (Article I Section 12) because it taxed distributors of fuel oil while leaving untaxed distributors of competing forms of fuel, such as coal, wood, sawdust and coke, and because distributors of fuel oil were made subject not only to the tax imposed by Chapter 186, but also to the compensating tax, making a total tax of 13% on distributors of fuel oil, whereas distributors of competing forms of fuel were subject only to the 2% compensating tax (R. 66, 67). This holding was based on a line of decisions by the state court construing Article I Section 12 of the constitution of the State of Washington. These cases which are cited in the opinion by the state court (R. 65, 67, 68) hold that, under Article I Section 12 of the state constitution, a statute must have a reasonable basis for classification for tax purposes, that all in each class must be taxed or exempted alike, and that there can be no arbitrary, capricious or unreasonable classification.

Under the authorities heretofore cited, this is also an independent non-federal ground adequate to support the judgment.

The Railway Company in the courts below, in addition to the non-federal grounds set forth above, urged additional reasons based on the federal constitution for the invalidity of Chapter 186 (R. 200-205). So, also, did petitioner urge that Section 15(e) was invalid under the 14th Amendment to the federal constitution (R. 218, 219). The State Supreme Court adopted as further reasons for holding Chapter 186 unconstitutional the federal grounds urged by the Railway Company and the petitioner. The line of demarcation between the non-federal and the federal grounds is made explicit by the opinion of the state supreme court. The vigor and strength of the non-federal grounds to support the judgment is not diminished one particle by the presence in the opinion of the additional federal grounds. Under these circumstances the existence of the additional federal questions has no significance. *Bilby v. Stewart*, 246 U. S. 255, 257; 62 L. ed. 701, 703.

There being no basis for contending the non-federal ground of decision was unfounded, arbitrary or a mere device to prevent review, this court will deny the petition for writ of certiorari.

In the cases cited by petitioner the federal protection invoked was denied or evaded on a non-federal ground. In the case at bar the situation is just the reverse. The petitioner sought no federal right that was denied. All federal rights invoked, aside from petitioner's contention that Section 15(e) was invalid under the 14th Amendment to the federal constitution, were invoked by the Railway Company. This is clearly shown in petitioner's recitation of the manner in which

federal questions were raised, appearing on pages 13 to 15 of its petition. All questions raised, both those arising under the federal constitution and those arising under the state constitution, were passed upon and sustained. None was evaded. All were decided adversely to the petitioner, except that the one federal question raised by petitioner—the invalidity of Section 15(e)—was decided in accordance with petitioner's contentions. Where the judgment is placed upon two grounds, one federal and the other not, this court tests its jurisdiction by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. A reading of the opinion by the Supreme Court of the State of Washington in this case is enough to show the judgment does not rest alone upon the decision of a federal question.

CONCLUSION

That part of petitioner's brief which is not devoted to a discussion of the merits contains an argument based not on Chapter 186 as construed by the state's highest court, but on Chapter 186 as petitioner would like it construed. Petitioner would ask this court to take Chapter 186 and reconstrue it. It is an axiom that this court will take the state statute precisely as interpreted by the state court and follow the state construction.

Minnesota ex rel. Pearson v. Probate Court of Ramsey Co., 84 L. ed. (Adv. Opinions) 477, 479;

Knights of Pythias v. Meyer, 265 U. S. 30, 33; 68 L. ed. 885, 888;

Guaranty Trust Co. v. Blodgett, 287 U. S. 509, 513; 77 L. ed. 463, 465;

J. Bacon & Sons v. Martin, 305 U. S. 380, 381; 83 L. ed. 233, 235;

Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 41; 70 L. ed. 818, 821;

Keith v. Johnson, 271 U. S. 1, 8; 70 L. ed. 795, 799;

American Railway Express Co. v. Royster Guano Co., 273 U. S. 274, 280; 71 L. ed. 642, 643;

Dorchy v. Kansas, 272 U. S. 306, 308; 71 L. ed. 248, 266;

Roe v. Kansas ex rel. Smith, 278 U. S. 191, 193; 73 L. ed. 259, 261;

Sutter Butte Canal Co. v. Railroad Commission, 279 U. S. 125, 139; 73 L. ed. 637, 641;

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 362; 77 L. ed. 360, 365.

The rule is stated in *Minnesota ex rel. Pearson v. Probate Court of Ramsey Co., supra*, 84 L. ed. (Adv. Opinions) 477, 479:

> "This construction is binding upon us. Any contention that the construction is contrary to the terms of the act is unavailing here. For the purpose of deciding the constitutional questions appellant raises, we must take the statute as though it read precisely as the highest court of the state has interpreted it,"

and in *Knights of Pythias v. Meyer, supra*, 265 U. S. 30, 33; 68 L. ed. 885, 888:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become

> axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation as though such meaning had been specifically expressed therein, * * * and we must follow the state construction even though it may not agree with our own opinion."

If the petition had set forth the theory followed by petitioner throughout this litigation it would have appeared frivolous on its face. The petitioner having at all times conceded that Chapter 186 was partially invalid under the state constitution, and the state court having held such partial invalidity rendered the entire act invalid—a holding conclusive upon this court—for this and the other reasons assigned in this brief, the writ should be denied.

Respectfully submitted,

R. E. LOWE,
Spokane, Washington.
Attorney for Respondent
Inland Empire Refineries, Inc.

F. G. DORETY,
St. Paul, Minnesota.

THOMAS BALMER,

EDWIN C. MATTHIAS,

ANTHONY KANE,
305 Great Northern Railway Building,
404 Union Street,
Seattle, Washington.
Attorneys for Respondent
Great Northern Railway Company.